IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02033-DDD-NYW

DUSTIN EDWARD MCDANIEL,

Plaintiff,

v.

DEAN WILLIAMS,
SCOTT DAUFFENBACH,
LEONARD WOODSON III,
LEROY VERNETTI,
LAURA SHUGHART, and
JESSICA ARCHULETA,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Nina Y. Wang

This matter comes before this court for recommendation on Defendants' Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Rule 12(b)(6) (the "Motion to Dismiss" or "Motion") [#22,[1] filed December 22, 2020]. This court considers the Motion pursuant to 28 U.S.C. § 636(b), the Order Referring Case dated October 13, 2020 [#18], and the Order Referring Motion dated December 23, 2020 [#22], and concludes that oral argument will not materially assist in the resolution of this matter. Accordingly, upon review of the Motion, related briefing, and applicable case law, I respectfully **RECOMMEND** that the Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**.

[1] This court uses the convention [#___] to refer to docket entries in the District of Colorado's Electronic Court Filing ("ECF") system.

BACKGROUND

This court draws the following facts from the Amended Prisoner Complaint (the "Amended Complaint") [#4] and presumes they are true for purposes of the instant Motion. Plaintiff Dustin Edward McDaniel ("Plaintiff" or "Mr. McDaniel") is currently incarcerated at the Arkansas Valley Correctional Facility ("AVCF") in Ordway, Colorado. [#4 at 1]. In 2004, Mr. McDaniel was convicted of sexual assault of a minor and sentenced to an indefinite term of eight years to life. [*Id.* at ¶ 17]. As a condition of his sentence, Mr. McDaniel must participate in the Colorado Department of Corrections ("CDOC")'s Sex Offender Treatment and Monitoring Program ("SOTMP") to become eligible for parole. [*Id.*]. Only certain CDOC facilities offer the SOTMP. [*Id.* at ¶ 8].

Mr. McDaniel alleges that there is no "meaningful process or procedure by which offenders will be prioritized for treatment in the SOTMP." [*Id.* at ¶ 11]. Mr. McDaniel alleges that, since his conviction, he has been "transferred from facility to facility by CDOC without access to" the SOTMP, which is "the only treatment program required of [Mr. McDaniel] to complete in order to be paroled." [*Id.* at ¶ 18]. He states that, notwithstanding a "brief stay" in 2005 at the Fremont Correctional Facility ("FCF") in Fremont County, Colorado, Mr. McDaniel has exclusively been housed at facilities that do not offer the SOTMP. [*Id.*].

Mr. McDaniel states that he has made "multiple attempts at placement in the SOTMP with no success at all." [*Id.* at ¶ 19]. Specifically, he alleges that he has applied for the SOTMP four times and each application has been denied.[2] [*Id.* at ¶¶ 21, 25-26, 28, 34]. In addition, he alleges that he has unsuccessfully exhausted the grievance process "on more than one occasion" in an

[2] These applications were filed in approximately July 2005, December 2005, December 2009, and 2018. [#4 at ¶¶ 21, 25-26, 28, 34].

attempt to be placed in the SOTMP. [*Id.* at ¶ 18]. He states that, "after nearly 16 years in prison, [he] still [has] not been accepted into the SOTMP." [*Id.* at ¶ 35]. Mr. McDaniel asserts that, despite the repeated application denials, he has continually met the participation requirements for the SOTMP based on evaluations and assessments conducted by the CDOC and has been eligible to transfer to a CDOC facility offering the SOTMP. [*Id.* at ¶¶ 36-38].

Mr. McDaniel asserts that these denials of access to the SOTMP have precluded him from becoming eligible for parole. [*Id.* at ¶¶ 29-30, 33]. According to Plaintiff, but for the denial of access to the SOTMP, he "could have been paroled by now." [*Id.* at ¶ 50]. In addition, Plaintiff asserts that "[t]he benefits of participation in SOTMP extend beyond the impact on parole eligibility, including, without limitation, the benefits associated with receiving appropriate and therapeutic clinical services and other benefits related to physical security and safety that are routinely provided to SOTMP participants but denied to sex offenders in general population." [*Id.* at ¶ 49].

In addition to the above allegations, Mr. McDaniel further alleges that, while incarcerated, he has been retaliated against for engaging in protected activity in violation of his First Amendment rights. *See generally* [*id.* at ¶ 18]. First, according to Mr. McDaniel, CDOC staff informed him that, "because [he was] appealing [his underlying conviction and/or sentence], [he would] never get in" to the SOTMP. [*Id.* at ¶ 19]. He alleges that the denials of his SOTMP applications and the transfers to facilities without SOTMP treatment were "punish[ment]" by the CDOC for appealing his underlying conviction or sentence. [*Id.* at ¶ 47].

In addition, Mr. McDaniel states that, on July 2, 2019, he "filed a civil suit regarding improper acts" by CDOC and AVCF staff related to Mr. McDaniel being denied access to his June 13, 2019 parole hearing (the "State Court Action"), [*id.* at ¶ 62], and asserts that he is now being

retaliated against for engaging in that protected activity. Mr. McDaniel alleges that, on July 18, 2019, he was taken to the SOTMP offices to meet with Defendant Jessica Archuleta, a CDOC therapist ("Ms. Archuleta"), and that Ms. Archuleta sought Mr. McDaniel's signature on an "agreement to participate in [the SOTMP]." [*Id.* at ¶ 64]. According to Mr. McDaniel, at this meeting, he and Ms. Archuleta discussed the possibility of Mr. McDaniel being transferred to FCF to begin SOTMP treatment. [*Id.*]. At the meeting, Mr. McDaniel stated that he did not want to be transferred to FCF because he wanted to maintain his single-cell housing and job at AVCF; Ms. Archuleta assured Mr. McDaniel that there was no reason for Plaintiff to transfer and that she would "contact [Plaintiff's] case manager and supervisor so that they could ensure [he] stay at AVCF." [*Id.*]. Mr. McDaniel alleges that he was then transferred to FCF on August 19, 2019, "against the agreement made with AVCF treatment program staff, undoubtedly as a form of retaliation for filing the [State Court Action]." [*Id.*].

On August 27, 2019, after Mr. McDaniel's transfer to FCF, Mr. McDaniel met with another CDOC therapist, Defendant Laura Shughart ("Ms. Shughart"), and Ms. Shughart attempted to enroll Mr. McDaniel in the SOTMP at FCF. [*Id.*]. Mr. McDaniel states that he informed Ms. Shughart that he "had an agreement with [Ms.] Archuleta to participate in [the SOTMP] at AVCF." [*Id.*]. Mr. McDaniel alleges that "Ms. Shughart became argumentative and unwilling to investigate the problem" and "stated that if [Mr. McDaniel did not] sign her agreement [for SOTMP participation], that she would claim that [Mr. McDaniel] refused treatment." [*Id.*]. According to Mr. McDaniel, he responded that he was not refusing treatment, but wanted to speak with Ms. Shughart's supervisor before signing any form. [*Id.*]. Mr. McDaniel claims that, later that day, Ms. Shughart and his case manager "fraudulently altered" his CDOC file to state that Mr. McDaniel refused SOTMP treatment. [*Id.*]. He alleges that he was then transferred to Crowley

County Correctional Facility ("CCCF") on September 3, 2019, 13 days after arriving at FCF, "as a form of punishment." [*Id.*].[3]

In addition to the above allegations, Plaintiff asserts that, while at CCCF, he was denied his personal belongings, including toiletries, he "was not allowed to shower for four days," and he was denied "extra clothes in order to warm up" from the sub-60 degree temperature. [*Id.* at ¶ 72]. Mr. McDaniel also alleges the CDOC "intentionally failed to arrange transportation [for him] to the El Paso County Jail" to attend a hearing in the State Court Action on November 4, 2019, which caused Plaintiff to miss the court hearing., [*id.* at ¶ 73], and that he has been denied access to his legal mail while incarcerated. [*Id.* at ¶¶ 83, 88]. Plaintiff asserts that each of these acts was an act of retaliation.

Plaintiff initiated this civil action on July 13, 2020, raising claims against Defendants Dean Williams ("Defendant Williams" or "Executive Director Williams"), Scott Dauffenbach, Leonard Woodson III, Leroy Vernetti, Ms. Shughart, and Ms. Archuleta (collectively, "Defendants"). *See* [#1]. Following orders from the Honorable Gordon P. Gallagher, Plaintiff filed the Amended Complaint on August 3, 2020, wherein Plaintiff alleges several constitutional claims pursuant to 42 U.S.C. § 1983 and adds Denise Balazic, a Colorado Parole Board member, as a defendant. *See generally* [#4]. Specifically, Plaintiff raises (1) a procedural due process claim under the "First, Fifth, Eighth, and Fourteenth Amendment[s]" based on the alleged deprivation of Plaintiff's liberty as a result of Defendants' alleged deprivation of access to SOTMP treatment, [*id.* at 55]; (2) a substantive due process claim, also purportedly arising under the First, Fifth, Eighth, and Fourteenth Amendments. [*Id.* at 56]. However, earlier in the Amended Complaint, Plaintiff also

[3] Mr. McDaniel was transferred back to AVCF on March 27, 2020. [*Id.*].

frames his second claim as asserting claims of "unconstitutional retaliation, resulting in cruel and unusual punishment." [*Id.* at 18].

Upon completing an initial review of the complaint, Magistrate Judge Gallagher recommended that the claims against the Defendants in their official capacity and against the CDOC be dismissed based on Eleventh Amendment immunity. [#7 at 5-6]. Judge Gallagher also recommended that the claim against Defendant Williams in his individual capacity be dismissed for lack of personal participation [*id.* at 6-7] and that Defendant Balazic be dismissed for improper joinder. [*Id.* at 7-9]. He also determined that the § 1983 claims brought against Defendants were not appropriate for summary dismissal and recommended that the court draw Plaintiff's remaining claims against Defendants in their individual capacities to the undersigned. [*Id.* at 9-10]. The Honorable Lewis T. Babcock adopted the Recommendation in large part, but also maintained Plaintiff's claims against Defendant Dean Williams in his individual capacity. *See* [#10 at 3]. Upon the Parties' nonconsent, the clerk of the court reassigned this matter to the Honorable Daniel D. Domenico, who referred the matter back to the undersigned. *See* [#16; #17; #18]. Thus, construing Plaintiff's Amended Complaint liberally, the court interprets the Amended Complaint as raising four claims: (1) a procedural due process claim under the Fourteenth Amendment[4] ("Claim One") against all Defendants in their individual capacity; (2) a substantive due process claim under the Fourteenth Amendment ("Claim Two"); (3) a retaliation claim under the First

[4] Plaintiff's Claim One and Claim Two are brought under the Fifth and Fourteenth Amendments. [#4 at 5, 55-56]. However, "[t]he Due Process Clause of the Fifth Amendment applies only to action by the federal government while the Due Process Clause of the Fourteen[th] Amendment applies to actions by state governments." *Koessel v. Sublette Cty. Sheriff's Dep't*, 717 F.3d 736, 748 n.2 (10th Cir. 2013). Because Plaintiff alleges constitutional violations committed by state actors, the court construes Claim One and Claim Two as arising under the Fourteenth Amendment.

Amendment ("Claim Three"); and (4) a deliberate indifference claim under the Eighth Amendment ("Claim Four"). *See generally* [*id.* at 5, 18].

On December 22, 2020, Defendants filed their Motion to Dismiss. [#22]. Defendants argue that Plaintiff's claims should be dismissed in their entirety on the grounds that (1) Plaintiff's Amended Complaint is repetitive of prior litigation; (2) Plaintiff fails to raise a First Amendment claim because he does not establish that Defendants' actions were substantially motivated by Plaintiff's protected activity; and (3) Plaintiff fails to state a due process claim related to the denial of SOTMP treatment because Plaintiff has failed to demonstrate the existence of a protected liberty interest. [*Id.* at 2-3]. In addition, Defendants assert that Plaintiff's claims should be dismissed because the claims fail to allege specific facts linked to each constitutional amendment under which he brings his claims. [*Id.* at 15]. Mr. McDaniel has since responded to the Motion to Dismiss, *see* [#30], and Defendants have replied, *see* [#31]. Because the Motion to Dismiss is ripe for Recommendation, I consider the Parties' arguments below.

LEGAL STANDARD

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). A plaintiff may not rely on mere labels or conclusions, "and a formulistic formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see also Robbins v.*

Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (explaining that plausibility refers "to the scope of the allegations in a complaint," and that the allegations must be sufficient to nudge a plaintiff's claim(s) "across the line from conceivable to plausible."). The court must ultimately "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

In applying these principles, this court is mindful that Mr. McDaniel proceeds *pro se* and the court thus affords his papers and filings a liberal construction. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). But the court cannot and does not act as his advocate, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), and applies the same procedural rules and substantive law to Plaintiff as to a represented party. *See Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.2 (10th Cir. 2008); *Dodson v. Bd. of Cty. Comm'rs*, 878 F. Supp. 2d 1227, 1236 (D. Colo. 2012).

ANALYSIS

I. Repetitive Litigation

First, Defendants argue that Plaintiff's Amended Complaint should be dismissed because it is repetitious of prior litigation in which Plaintiff was previously involved. [#22 at 4]. On November 17, 2019, two CDOC inmates sued several CDOC defendants in the District Court of El Paso County, Colorado, alleging *inter alia* that the defendants had refused to permit the inmates to complete SOTMP treatment. *See Vreeland v. State of Colo. Parole Bd.*, No. 20-cv-00020-LTB-GPG ("*Vreeland*"), [*Vreeland*, ECF No. 5 at 9-10].[5] The inmates alleged that this denial of SOTMP treatment violated their constitutional rights. *Id.* at 14-15. The case was removed to

[5] The court uses the convention "*Vreeland*" introductory signal and "ECF No. ___" when referring to the *Vreeland* docket and its associated entries from the District's ECF system.

federal court on January 3, 2020, [*Vreeland*, ECF No. 1], and an amended complaint was filed on May 14, 2020, adding Mr. McDaniel as a plaintiff (the "*Vreeland* Complaint"). [*Vreeland*, ECF No. 21]. The *Vreeland* Complaint, as relevant to the instant action, alleges that Richard Raemisch (the former Executive Director of CDOC) and Robin Garrelts "refuse[d] to allow Plaintiff[s] access to the SOTMP program [sic] to complete it, and have punished Plaintiffs for their failure to complete the program these Defendants are denying Plaintiffs access to." [*Id.* at 13]. The *Vreeland* plaintiffs claimed that this scheme violated their due process rights. [*Id.* at 12-14]; *see also* [*id.* at 19 ("Defendants Raemisch [and] Garrelts . . . designed a scheme to force specific inmates to serve the maximum sentence" because "[i]nmates with determinate sentences are intentionally denied access to SOTMP.")].

After considering the plaintiffs' claims, Magistrate Judge Gallagher recommended that the plaintiffs' claims be dismissed. [*Vreeland*, ECF No. 24 at 2]. With respect to the due process claim related to the alleged denial of access to SOTMP, Magistrate Judge Gallagher examined whether the plaintiffs had a liberty interest in being placed on parole—the potential result of completing SOTMP treatment. [*Id.* at 8-9]. Finding no liberty interest in being paroled, the court concluded that the plaintiffs had failed to allege facts demonstrating that they had been deprived of due process and found that "the due process component of [the due process claim was] legally frivolous." [*Id*. at 10]. Judge Babcock accepted the Recommendation and dismissed the plaintiffs' claims. [*Vreeland*, ECF No. 32 at 3].[6]

Defendants assert that the claims raised and dismissed in *Vreeland* "address[] the same procedural and substantive due process issues as are raised in the present case" and the Amended Complaint "should be dismissed on that basis." [#22 at 5]. Plaintiff responds that Defendants'

[6] Mr. McDaniel did not object to the recommendation. [*Vreeland* #32 at 2].

argument "has no merit because [he] withdrew [himself] as a Plaintiff" from *Vreeland* and because his claims are sufficiently distinct from the *Vreeland* claims so as to not be repetitious of that prior litigation. [#30 at 3].

Although Plaintiff did attempt to withdraw as a plaintiff in *Vreeland*, *see* [*Vreeland*, ECF No. 34], Judge Babcock denied the purported withdrawal as moot "because the instant action was dismissed before the request to withdraw was filed." [*Vreeland*, ECF No. 38]. Indeed, the Order of Dismissal was entered prior to Plaintiff's notice of dismissal. [*Vreeland*, ECF No. 32]. For this reason, Plaintiff's attempted withdrawal in *Vreeland* has no bearing on the court's analysis of this issue.

"'Repetitious litigation of virtually identical causes of action' may be dismissed under [28 U.S.C.] § 1915 as frivolous or malicious." *McWilliams v. State of Colo.*, 121 F.3d 573, 574 (10th Cir. 1997) (quoting *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988) (alteration marks omitted)). To determine whether a pleading repeats pending or previously litigated claims, the Court may consult its own records." *Johnson v. Doe*, No. 18-cv-00194-KLM, 2018 WL 10230992, at *2 (D. Colo. Apr. 6, 2018). "[G]enerally, a suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions." *Park v. TD Ameritrade Trust Co., Inc.*, 461 F. App'x 753, 755 (10th Cir. 2012) (unpublished). Upon reviewing the *Vreeland* claims and the claims in the instant action, the court finds that, although the claims raised in the two actions somewhat overlap, they differ in important ways.

In the surviving claims of his Amended Complaint in this action, Plaintiff raises specific allegations against the named Defendants—none of whom were named in the *Vreeland* action[7]—

[7] Though the Executive Director of the CDOC has been named in both this action and *Vreeland*, the claims remaining in this action proceed against Defendant Williams in his individual capacity. [#10]. None of the defendants in *Vreeland* are named as defendants in the present action. Courts

asserting that Defendants "deprived [him] of Liberty without Due Process through acts of manipulation and deception . . . by denying [him] access to treatment said to be required for release on parole." [#4 at 5]. Generally, Plaintiff alleges that he was denied access to the SOTMP, despite being qualified to participate in the program, and that he was transferred from facility to facility so that his ability to participate in the SOTMP would be hindered or impossible. *See, e.g.*, [*id.* at ¶¶ 18-19, 21-32, 34-39]. On the other hand, the *Vreeland* Complaint raises allegations against Richard Raemisch and Robin Garrelts, asserting that they created a scheme to deprive inmates of access to SOTMP, but asserting none of the specific allegations Plaintiff now raises with respect to the denials of his applications for SOTMP treatment and his transfer amongst CDOC facilities. *See generally* [*Vreeland*, ECF No. 21]. Moreover, Mr. McDaniel's claims under the First and Eighth Amendments are not duplicative of the *Vreeland* claims, which "primarily relate[d] to [SOTMP] and the computation of prison sentences for sex offenders in Colorado." [*Vreeland*, ECF No. 24 at 4].

Although Plaintiff's due process claims may be premised on the same legal principles as a claim in the *Vreeland* action, *see generally* [#4], Defendants do not suggest that this is a basis to find this lawsuit repetitive of prior claims. *See* [#22 at 4-5]. The court finds that the claims raised in the present action are sufficiently dissimilar from those raised in *Vreeland* so as to justify

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may consider duplicity of parties in determining whether litigation is repetitive. *See Hockaday v. Tomlin*, No. 17-cv-02991-GPG, 2017 WL 11483490, at *1 (D. Colo. Dec. 18, 2017) (finding that the plaintiff "may not pursue § 1983 claims in this action that are premised on the same conduct that forms the basis of his claims against [the same defendants]" in another action); *Johnson v. Doe*, No. 18-CV-00194-KLM, 2018 WL 10230992, at *2 (D. Colo. Apr. 6, 2018) (finding that the plaintiff's claims were repetitive of similar claims alleged against same defendants in separate lawsuit).

dismissal of this action as duplicative.[8] *Park*, 461 F. App'x at 755. As a result, this court respectfully disagrees with Defendants' assertion that Plaintiff's Amended Complaint must be dismissed because it is repetitive of prior litigation. Accordingly, I turn to Defendants' arguments asserting that Plaintiff's claims must be dismissed on the merits.

II. Plaintiff's First Amendment Claim

First, Defendants argue that Mr. McDaniel's First Amendment claim, Claim Three, should be dismissed for failure to allege that his protected activity was the but-for cause of Defendants' alleged retaliatory actions. [#22 at 6]. According to Defendants, "[o]nly a few of [Plaintiff's] allegations of retaliation relate to the protected conduct . . ., and those few allegations are merely conclusory." [*Id.*]. In response, Mr. McDaniel argues that he has "submitted proof" demonstrating that he was retaliated against after filing the State Court Action and further states that, "through depositions and the discovery process, the Defendants will be forced to reveal information demonstrating that they would not have engaged in this alleged conduct but for [Mr. McDaniel] exercising [his] rights, further proving [his] claim of retaliation." [*Id.* at 4-6].

With respect to Mr. McDaniel's assertion that, through discovery, new information will come to light demonstrating Defendants' retaliation, the court cannot rely on yet-to-be discovered facts in evaluating Defendants' Motion. A motion to dismiss challenges the sufficiency of the plaintiff's complaint. *See Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) ("The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.") (quotation omitted). Thus,

[8] The court notes that Magistrate Judge Gallagher, who conducted an initial screening of Plaintiff's claims in this case pursuant to 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c), did not recommend that the claims be dismissed as legally frivolous or repetitive of prior litigation. *See* [#7].

the court considers only Plaintiff's Amended Complaint, and the attachments thereto,[9] to determine whether he has stated a claim for relief.

To state a First Amendment retaliation claim, Plaintiff must allege that: (1) he "was engaged in constitutionally protected activity"; (2) Defendants' "actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) Defendants' "adverse action was substantially motivated as a response to [Plaintiff's] exercise of constitutionally protected conduct." *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007). Defendants' challenge relates to the third element—the requisite causal link between a plaintiff's protected activity and the defendant's actions. *See* [#22].

To establish that causal connection, it is insufficient to simply state that certain acts were motivated by a retaliatory animus. "Recitation of the acts done to plaintiffs . . . does not satisfy the requirement of showing how those acts are connected to plaintiffs' protected activity." *Leal v. Falk*, No. 19-cv-01387-PAB-NYW, 2021 WL 1186662, at *5 (D. Colo. Mar. 29, 2021). However, "[t]he presentation of circumstantial evidence such as temporal proximity, a chronology of events, or suspicious timing may be sufficient to support allegations of retaliation." *Davis v. Hoffman*, No. CIVA03D1956(BNB), 2006 WL 1409433, at *7 (D. Colo. May 18, 2006). But unless the temporal proximity between the protected activity and the adverse action is "very close," *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001), "temporal proximity between the protected speech and the alleged retaliatory conduct, without more, does not allow for an inference of a retaliatory motive." *Trant v. Oklahoma*, 754 F.3d 1158, 1170 (10th Cir. 2014); *see also Friedman*

[9] When reviewing a complaint for failure to state a claim, the court considers the four corners of the complaint and "any attached exhibits or documents referenced therein whose accuracy is not disputed." *Sanchez v. Bauer*, No. 14-cv-02804-MSK-KLM, 2015 WL 5026195, at *3 (D. Colo. Aug. 26, 2015); Fed. R. Civ. P. 10(c).

v. Kennard, 248 F. App'x 918, 922 (10th Cir. 2007) (unpublished) ("Standing alone and without supporting factual allegations, temporal proximity between an alleged exercise of one's right of access to the courts and some form of jailhouse discipline does not constitute sufficient circumstantial proof of retaliatory motive to state a claim.")

Plaintiff alleges that he engaged in constitutionally protected activity by filing the State Court Action on July 2, 2019 and, as a result, he has been retaliated against in a number of ways. [#4]. I will address each category of alleged retaliation in turn.

SOTMP Eligibility Classification. First, Mr. McDaniel asserts that he was retaliated against when the CDOC misclassified his eligibility for SOTMP. Mr. McDaniel alleges that, "[a]t all times relevant to this action, prior to July 18, 2019," he was given either the "D," "F," or "P"[10] classification, [*id.* at ¶ 112], which resulted in a denial of Mr. McDaniel's access to SOTMP. [*Id.* at ¶ 54]. However, these allegations do not sufficiently allege that the purported misclassifications were made in retaliation for Plaintiff's protected activity, as the alleged misclassifications occurred prior to the filing of the State Court Action on July 2, 2019. *See Ray Westall Operating, Inc. v. Richard*, No. CV 20-302 KG/GJF, 2021 WL 24576, at *8 (D.N.M. Jan. 4, 2021) ("Ordinarily, the occurrence of the adverse action prior to the alleged protected activity renders a plaintiff unable to bring a retaliation claim.") (quotation and alteration marks omitted); *Brown v. Tuttle*, No. 3:13-CV-1444 VAB, 2015 WL 3886466, at *8 (D. Conn. June 24, 2015) ("Th[e] allegation does not state a claim of retaliation because the alleged retaliatory conduct occurred before the exercise of

[10] Mr. McDaniel states that "D" stands for "Does Not Meet Criteria: The offender does not meet the SOTMP participation requirements," that "F" stands for "Future: The offender has a sexual behavior criminal case waiting judicial determination," and "P" stands for "Pending: The offender meets the SOTMP participation requirements, but has previously been terminated, dropped out or treatment, refused SOTMP group placement, refused SOTMP screening, or is determined not to be amenable to treatment during the SOTMP screening." [#4 at ¶ 112].

the Mr. Brown's First Amendment rights."). Indeed, the only classification change that Mr. McDaniel alleges occurred after the State Court Action was the alleged correction of Plaintiff's eligibility classification: Mr. McDaniel asserts that, on July 18, 2019, his "classification code was conveniently changed to an R-Ready, meaning [he] was accepted into the SOTMP." [*Id.* at ¶ 71]. And Plaintiff does not allege that his "R" classification constitutes an adverse action, but rather, he asserts that it is proof that Defendants knowingly wrongly classified him prior to the State Court Action. *See* [*id.*]. Because Plaintiff cannot establish that the protected activity caused this alleged adverse action, these allegations cannot support a First Amendment retaliation claim.[11]

Housing. Mr. McDaniel alleges that his August 19, 2019 transfer from AVCF to FCF was "undoubtedly . . . a form of retaliation for filing [the State Court Action]." [*Id.* at ¶ 64]. In addition, he alleges that, in April 2020, he sent a kite[12] and two emails to a CDOC official named Captain Mendoza requesting that his housing assignment be revised, but he never received a response. Mr. McDaniel claims that this lack of response was retaliation for the State Court Action. [*Id.* at ¶ 87].

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[11] Reading Plaintiff's Amended Complaint liberally, Mr. McDaniel also suggests that the allegedly improper classification of his SOTMP status was retaliation based on his appeal of his original conviction and/or sentence. *See* [#4 at ¶ 113] (alleging that he was misclassified "for engaging in constitutionally protected activity" related to his appeal and that the misclassification rendered him ineligible for SOTMP)]. Mr. McDaniel alleges that "[CDOC] staff" informed him that he would not gain access to SOTMP due to his pending appeal. [*Id.*; *id.* at ¶ 67]. Defendants do not address these allegations in their Motion to Dismiss, *see* [#22], but Mr. McDaniel points to some of these allegations in support of his First Amendment claim. *See* [#30 at 5]. Although this is not a point raised in the Motion to Dismiss, this court notes that any claims arising from alleged retaliatory conduct from 2012 to 2016 [#4 ¶¶ 67, 113] would appear to be barred by the statute of limitations, given that the applicable limitation in Colorado is two years. *See* Colo. Rev. Stat. § 13-80-102(1)(g) ("All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute" and "regardless of the theory upon which suit is brought . . . must be commenced within two years.").

[12] A kite is a written request by an inmate. *See Nasious v. Robinson*, No. 08-cv-00262-CMA-KMT, 2010 WL 1268135, at *9 n.7 (D. Colo. Feb. 17, 2010).

The court finds that the allegations regarding Plaintiff's transfer from AVCF to FCF are also insufficient to state a First Amendment retaliation claim. Even reading the Amended Complaint liberally and assuming (without deciding) that Plaintiff has sufficiently alleged that Executive Director Williams had control over the transfer, *see* [#4 at ¶¶ 90, 98 (stating that Defendant Williams "has [a]ll the right and power to transfer an inmate between correctional facilities" and that Defendant Williams "allowed [Plaintiff] to be transferred out of retaliation")], the Amended Complaint contains no allegations that Executive Director Williams knew of the State Court Action, wherein he was not a named defendant. *See* [#4 at 64 (showing that Plaintiff's civil lawsuit was filed against the CDOC and the Colorado State Parole Board)]. "Causation is lacking where Plaintiff has not shown that the party who took adverse action against him knew of his protected activity." *Muragara v. Accountemps, a Robert Half Co.*, No. 15-CV-00932-RBJ-NYW, 2015 WL 13730879, at *4 (D. Colo. Sept. 16, 2015), *report and recommendation adopted*, 2015 WL 8133000 (D. Colo. Dec. 8, 2015). Plaintiff's Amended Complaint contains no allegations from which to infer a retaliatory motive; indeed, Plaintiff simply assumes that his transfer was "undoubtedly as a form of retaliation for filing the civil suit," [#4 at ¶ 64], but provides no factual allegations in support of this assertion. The court finds that the allegations regarding housing cannot serve as a basis for Plaintiff's retaliation claim. *See Horton v. Davis*, No. 13-cv-01089-REB-BNB, 2014 WL 2593075, at *6 (D. Colo. June 10, 2014) (finding that the plaintiff had failed to state a claim for retaliation where the plaintiff alleged that he had been transferred from one unit to another three months after his protected activity, but where there were

no "specific facts from which to infer that [the defendant] had knowledge" of the protected activity).[13]

The Alteration of Plaintiff's CDOC File. Next, Mr. McDaniel claims that on August 27, 2019, Ms. Shughart "corresponded with [his] Case Manager . . . [and they] conspired to falsify [his] DOC file" by altering his offender classification points and claiming that Mr. McDaniel refused SOTMP treatment." [#4 at 64]. He states that "this was done in order to ultimately dump [him] at Crowley County Correctional Facility . . . as a form of punishment." [*Id.*]; *see also* [*id.* at ¶ 126 ("This discretionary re-class was only done in order to retaliate against me for suing CDOC.")]. However, Mr. McDaniel does not sufficiently plead allegations demonstrating that Ms. Shughart knew of Plaintiff's protected activity so as to establish the requisite causal link. *Muragara*, 2015 WL 13730879, at *4. The Amended Complaint contains no allegations, other than Plaintiff's cursory assertions, demonstrating that this act was retaliatory in nature. For this reason, I find that these allegations cannot support a retaliation claim.

Deprivation of Personal Belongings and the Ability to Bathe. Mr. McDaniel alleges that, on October 28, 2019, he was prevented from showering for four days and was deprived of his personal belongings in retaliation for filing the State Court Action. [*Id.* at ¶ 72]; *see also* [*id.* at ¶ 75 (Plaintiff alleging that, in December 2019, he was housed at the Canon City Cell House 5 for a week without access to his personal belongings "as a form of retaliation.")]. The court finds these allegations insufficient to state a retaliation claim for a few reasons. First, these allegations contain no specific facts permitting an inference of retaliation, and the four- to six-month gap

[13] To the extent Plaintiff alleges that he was retaliated against in the form of Captain Mendoza's non-responses, this is also insufficient to state a claim of First Amendment retaliation. Captain Mendoza not a named defendant in this lawsuit, and Plaintiff does not tie the allegations concerning Captain Mendoza's actions to any named defendant. *See* [#4 at ¶ 87].

between the protected activity and the alleged adverse actions is an insufficient basis to infer causation. *Lamb v. Montrose Cty. Sheriff's Office*, 16-cv-03056-RM-GPG, 2019 WL 2866646, at *4 (D. Colo. July 3, 2019) ("Under Tenth Circuit precedent, temporal proximity alone is insufficient to establish causation if the retaliatory action occurs more than three months after protected activity.") (quotation omitted). Moreover, Plaintiff does not connect these alleged adverse actions with any of the named defendants in this action. *See* [#4 at ¶ 72 (stating that "the staff" took his belongings); *id.* at ¶ 75 (stating that "CDOC purposely left [him]" at Canon City Cell House 5)]. "[I]t is incumbent upon a plaintiff to 'identify *specific* actions taken by *particular* defendants' in order to make out a viable § 1983 . . . claim." *Pahls v. Thomas*, 718 F.3d 1210, 1226 (10th Cir. 2013) (quoting *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998) (emphasis in original)). The court finds that Plaintiff has failed to demonstrate a link between the State Court Action and the deprivation of personal belongings and his ability to shower so as to state a First Amendment retaliation claim under those facts.

Interference with the Legal Process and Deprivation of Mail. Finally, Mr. McDaniel asserts that, on November 4, 2019, the CDOC "intentionally failed" to arrange transportation for Mr. McDaniel to a scheduled hearing in his State Court Action, which caused him to miss the hearing. [*Id.* at ¶¶ 73, 75]. He also alleges that his attorney from the State Court Action mailed his legal file to him but that, "[o]nce it made it to the facility, it disappeared and [Mr. McDaniel] never received it," which Mr. McDaniel claims is "[a]nother act of retaliation." [*Id.* at ¶ 83].[14] Moreover, Plaintiff alleges that he "never received . . . through the AVCF mail system" a copy of Magistrate Judge Gallagher's order directing him to file an amended complaint in this action, [*id.*

[14] Mr. McDaniel states that this occurred "back . . . in February." [#4 at ¶ 83]. Based on the timing of Mr. McDaniel's lawsuit, the court presumes that this occurred in February 2020.

at ¶ 88]; *see also* [#3 (Magistrate Judge Gallagher ordering Plaintiff to file an amended complaint on or before August 17, 2020)], which he claims is evidence of retaliation. [#4 at ¶ 88].

The court finds that these allegations are insufficient to state a retaliation claim against any of the Defendants in their individual capacities because Plaintiff has not tied any of these alleged actions to any of the Defendants. *Pahls*, 718 F.3d at 1226. Instead, Plaintiff attributes these actions to the CDOC in general.[15] *See, e.g.*, [#4 at ¶¶ 73, 75]. However, Mr. McDaniel's claims against the CDOC have been dismissed without prejudice on the basis that the CDOC is entitled to Eleventh Amendment immunity, *see* [#10 at 4], and the CDOC is no longer a defendant in this lawsuit. And even if the CDOC remained a defendant, for Mr. McDaniel to state a cognizable § 1983 violation against the CDOC, he would have to plead sufficient facts for a factfinder to conclude that a CDOC policy or procedure was "moving force" behind an unnamed CDOC employee failing to provide transportation and/or interfering with his mail. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985). Thus, these allegations are insufficient to sustain a claim of First Amendment retaliation.

In sum, each of Plaintiff's allegations asserting retaliation are insufficient to state a claim under the First Amendment because Plaintiff has not established a causal link between any of the alleged acts of retaliation and his protected activity. As a result, I respectfully **RECOMMEND** that Claim Three be **DISMISSED without prejudice** and that Plaintiff be **GRANTED** leave to amend to address the identified deficiencies. *See Tinnin v. Soc. Sec. Admin.*, No. 18-CV-02869-RM-NYW, 2018 WL 6990396, at *4 (D. Colo. Dec. 13, 2018) ("[C]ourts should generally provide

[15] To the extent that Claim Three is read as a retaliation claim against the Defendants in their official capacities for prospective injunctive relief, it would be, for all intents and purposes, a claim against the CDOC. *State v. Nieto*, 993 P.2d 493, 508 (Colo. 2000) ("There is no difference between suing a state employee in his or her official capacity and suing the state.")

plaintiffs, especially those proceeding *pro se*, an opportunity to amend their pleadings to cure identified deficiencies.").

III. Plaintiff's Due Process Claims

Next, Defendants assert that Plaintiff's due process claims should be dismissed on the basis that Colorado inmates to not have a due process right to "[u]nfettered" access to the SOTMP. [#22 at 7]. Specifically, Defendants argue that (1) an inmate has no liberty interest in parole; (2) an inmate has no liberty interest in receiving rehabilitative treatment; and (3) "numerous Tenth Circuit and other cases" have held that, in light of this lack of liberty interest, a Colorado inmate has no right to "unfettered access to placement" in the SOTMP. [*Id.* at 8]. Plaintiff responds that he does not seek "unfettered" access to treatment and that he does not contend that he has a liberty interest in parole. [#30 at 6]. However, he argues that "an inmate does have a liberty interest right to be *considered* for parole" and that, for him, that requires enrollment in and completion of the SOTMP. [*Id.*].

To assert either a procedural or substantive due process claim, a plaintiff must allege that they have a protected liberty interest that has been infringed. *Fristoe v. Thompson*, 144 F.3d 627, 630 (10th Cir. 1998). Defendants assert that Mr. McDaniel cannot state a due process claim because he has no liberty interest in being paroled or in receiving rehabilitative treatment. [#22 at 8]. Mr. McDaniel responds that he has a liberty interest in being considered for parole, relying on *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004), and *Tillery v. Raemisch*, No. 16-cv-0282-WJM-STV, 2017 WL 217816 (D. Colo. Jan. 18, 2017). [#33 at 6, 12].

In *Beebe*, an inmate alleged that his then-active participation in the SOTMP was terminated without notice and without the opportunity to be heard, which violated his right to due process. 333 F. Supp. 2d at 1012. The court determined that, based on the mandatory language of Colo.

Rev. Stat. § 18-1.3.1004(3) ("Each sex offender sentenced pursuant to this section *shall be required* as part of the sentence to undergo [SOTMP treatment]" (emphasis added)), the inmate had a cognizable liberty interest in not being terminated from the SOTMP because the withholding of treatment would "change [the inmate's status] from 'eligible to be considered for parole' to 'ineligible to be considered for parole.'" *Beebe*, 333 F. Supp. 2d at 1017. Because the Colorado statute conditions parole on the successful treatment of the SOTMP, and the termination of that treatment would result in a "grievous loss to the inmate," the inmate had sufficiently alleged "a cognizable liberty interest for due process purposes." *Id.* (quotation omitted).

Defendants argue that *Beebe* is distinguishable from this case because, unlike the plaintiff in *Beebe*, Mr. McDaniel "has not begun sex offender treatment in the first place." [#22 at 13]. However, a similar argument was raised and rejected in *Tillery*. In that case, the court adopted the magistrate judge's analysis construing *Beebe* as a decision "focus[ing] on the liberty interest created by a deprivation of treatment . . . whether the deprivation occurs as the result of termination from the [SOTMP] or being denied access to the [SOTMP] altogether." *Tillery*, 2017 WL 217816 at *6 (quotation omitted). Because the *Tillery* plaintiff had alleged that he was placed in a facility that did not offer the SOTMP and that his requests for a transfer had been denied or rebuffed, the court found that the plaintiff had alleged a "complete denial" of treatment resulting in a change in "Plaintiff's status . . . from eligible to ineligible for parole." *Id.* Finding that "this deprivation of treatment amounted to a 'grievous loss' to Plaintiff, thereby implicating a protected liberty interest," the court determined that the plaintiff had sufficiently stated a procedural due process claim and denied the defendants' motion to dismiss that claim. *Id.*

Again, Defendants assert that *Tillery* is distinguishable because, unlike the *Tillery* plaintiff who experienced a "complete denial" of access to SOTMP, Mr. McDaniel "was offered treatment

in 2019 [but] declined to accept treatment because it was offered at a facility other than where he had been housed." [#22 at 13]. However, Mr. McDaniel repeatedly and consistently denies in his Amended Complaint that he refused SOTMP treatment, and states that his CDOC file was "falsif[ied]" to erroneously claim that he denied treatment. *See, e.g.*, [#4 at ¶¶ 64, 124]. Although Defendants assert that this allegation "should not be accepted as true . . . as it is contradicted by a contemporaneous record that [Mr. McDaniel] attached to his own pleading," *see* [#22 at 13]; *see also* [#4 at 127 (Health Services Encounter form filled out by Ms. Shughart after the August 27, 2019 meeting with Mr. McDaniel)], the court respectfully disagrees. When reviewing a complaint for failure to state a claim, the court considers the four corners of the complaint and "any attached exhibits or documents referenced therein *whose accuracy is not disputed*." *Sanchez*, 2015 WL 5026195, at *3 (emphasis added). By repeatedly asserting that he did not refuse treatment and asserting that the statements otherwise in the Health Services Encounter form are false, Mr. McDaniel has disputed the accuracy of those documents. *See* [#4 at ¶ 64 (Mr. McDaniel stating that he told Ms. Shughart that "[he was] not refusing treatment" and that Ms. Shugart "fraudulently altered [his DOC file] and claimed that [he] refused treatment"). Moreover, the court respectfully disagrees that Mr. McDaniel's allegations are contradicted by the record; the Health Services Encounter form states that, during the August 27, 2019 meeting with Ms. Shughart, Mr. McDaniel did, in fact, state: "I'm not refusing [treatment]." [*Id.* at 127]. Thus, the court construes Plaintiff's allegation that he did not refuse treatment as true and finds Defendants' distinction of *Tillery* unavailing.

Based on the guidance provided in *Beebe* and *Tillery*, the court respectfully disagrees with Defendants' assertion that Mr. McDaniel has not sufficiently alleged a liberty interest in access to SOTMP. Mr. McDaniel has alleged that he has been repeatedly and arbitrarily denied access to

the SOTMP despite meeting its eligibility requirements, that this denial of access to the SOTMP has rendered him ineligible for parole, and that this denial of access has violated his due process rights. The court finds that Mr. McDaniel has sufficiently pleaded a "complete denial" of and "deprivation of treatment" which implicates a liberty interest for purposes of stating a due process claim. *Tillery*, 2017 WL 217816, at *6.

In the alternative, Defendants assert that Claim Two, Plaintiff's substantive due process claim, should be dismissed for failure to state a claim. "The Supreme Court of the United States has emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification of a legitimate governmental objective." *Smith v. City of Thornton*, No. 12-cv-02915-WYD-MEH, 2013 WL 5420706, at *3 (D. Colo. Sept. 27, 2013) (quotation omitted). "The standard for judging a substantive due process claim is whether the challenged governmental action would 'shock the conscience of federal judges.'" *Tillery*, 2017 WL 217816, at *6 (quoting *Tonkovich*, 159 F.3d at 528). "A substantive due process violation must be something more than an ordinary tort to be actionable under § 1983." *Id.* (quotation omitted). To state a substantive due process claim, a plaintiff must allege behavior that is "so egregious, so outrageous that it may fairly be said to shock the contemporary conscience." *Beebe*, 333 F. Supp. 2d at 1018 (quotation omitted). "Prisoners are entitled to substantive due process; but substantive-due-process rights available to free persons may be denied to prisoners if the denial 'bear[s] a rational relation to legitimate penological interests.'" *Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

Defendants argue that the Plaintiff cannot state a substantive due process claim because promulgation and enforcement of CDOC policies related to the SOTMP cannot constitute conscience-shocking behavior when the policy is reasonably related to a legitimate penological interest. [#22 at 15]. In making this argument, Defendants focus on "[t]he tenets" of the SOTMP, including participating in therapy and admitting responsibility for the underlying crime, and state that, because these policies "[are] reasonably related to a legitimate penological interest," Mr. McDaniel's substantive due process claim must be dismissed. [*Id.*].

Respectfully, the court is not persuaded by Defendants' argument. Plaintiff does not allege in the Amended Complaint that Defendants violated his substantive due process rights by requiring that he admit to wrongdoing before participating in the SOTMP or requiring that he participate in therapy. *See* [#4]. Instead, Plaintiff's due process claim is based on allegations that he has been repeatedly denied access to the SOTMP despite being eligible for the program. *See* [*id.* at ¶¶ 18-19 (Mr. McDaniel alleging that he has almost exclusively been housed at facilities that do not offer SOTMP treatment and that he has made multiple attempts at SOTMP placement with no success). Moreover, to the extent that Defendants argue that the promulgation of a regulation cannot constitute conscience-shocking behavior, Plaintiff alleges that the CDOC's regulations are not being properly followed: "The [CDOC's] Global Referral List [for determining SOTMP priority] does not comply with the parameters set forth in [the CDOC's regulations] and does not afford any meaningful process or procedure by which offenders will be prioritized for treatment in the SOTMP." [*Id.* at ¶ 11].

The court find this case is similar to *Tillery*, wherein the plaintiff alleged that CDOC guidelines were not being followed and that he would never be able to receive SOTMP treatment because he was being housed in a CDOC facility that did not offer that treatment. 2017 WL

217816, at *6. Here, Mr. McDaniel alleges that he has been repeatedly denied placement at a SOTMP-capable facility based on the "practice of arbitrarily depriving some offenders of statutorily-mandated treatment" so as to deny him an opportunity of ever meeting the requirements for parole eligibility. *See* [#4 at ¶ 4]. The court finds that these allegations sufficiently state a claim that shocks the conscience. *Tillery*, 2017 WL 217816, at *6. For this reason, the court finds that Defendant has sufficiently pled a due process claim. I therefore **RECOMMEND** that the Motion to Dismiss be **DENIED** with respect to Defendants' request to dismiss Plaintiff's due process claims.

IV. Plaintiff's Eighth Amendment Claim

Finally, Defendants generally argue that "the First, Fifth, Eighth and Fourteenth Amendment claims collectively raised by [Plaintiff] . . . should be dismissed for failure to 'allege specific facts linked to each asserted constitutional amendment that explain how his rights have been violated.'" [#22 at 15 (quoting *Vreeland v. Raemisch*, No. 18-cv-02685-LTB, 2019 WL 8128734, at *4 (D. Colo. Mar. 15, 2019))]. In response, Mr. McDaniel argues that he need not precisely state each element of each claim in order to sufficiently state a claim. [#30 at 13].

Because the court has recommended that Plaintiff's Claim Three claim be dismissed without prejudice, the court finds that Defendants' argument with respect to the First Amendment is now moot. Moreover, because the court has already determined that Plaintiff has sufficiently stated a claim under the Fourteenth Amendment, the court respectfully disagrees with Defendants' argument as it relates to the due process claims. Accordingly, the court addresses Defendants' argument only in the context of Claim Four, the Eighth Amendment claim.

To sufficiently state a claim for relief, a plaintiff must inform the defendant of the basis of the plaintiff's cause of action. *ElHelbawy v. Holder*, No. 14-cv-02032-CBS, 2015 WL 1839132,

at *2 (complaint may be subject to dismissal if it "fails to reasonably inform the adverse party of the basis for the cause of action"). Mr. McDaniel's Eighth Amendment claim appears to be asserted on two separate bases: First, Mr. McDaniel states that he has been subject to cruel and unusual punishment in violation of the Eighth Amendment because he is "years past" his parole eligibility date and because he "will languish in prison indefinitely" due to the denial of access to the SOTMP, such that his incarceration has been rendered disproportionate to his offense. [#4 at ¶ 58]. In addition, Mr. McDaniel appears to raise a "conditions-of-confinement" claim, alleging that the denial of SOTMP access has rendered him at risk of violence within the facility "due to the nature of [his] offense." [*Id.* at ¶ 60]. Plaintiff alleges that participation in the SOTMP provides "benefits related to physical security and safety that are . . . denied to sex offenders in general population." [*Id.* at ¶ 49]. In support of his claim, Plaintiff asserts that, in 2005, he was physically assaulted by other inmates. [*Id.* at ¶ 60].

This court agrees with Mr. McDaniel that he need not precisely state each element of each claim to put Defendants on notice of the basis of Plaintiff's Claim Four, particularly in light of the court's liberal construction of his filings. Even if Plaintiff does not expressly link each fact that may support his Eighth Amendment claim specifically to that claim, Plaintiff's routine use of the phrase "cruel and unusual punishment" when discussing various factual allegations or arguments sufficiently establishes the underlying theories of his Eighth Amendment claim and which factual allegations he believes support that claim.[16] However, the court nevertheless has a statutory

[16] For example, with respect to Mr. McDaniel's allegation that Defendants have violated the Eighth Amendment by essentially rendering his sentence disproportionate to his offense by refusing him access to parole prerequisites, Plaintiff asserts that the deprivation of access to SOTMP "constitutes an atypical hardship in comparison to normal conditions of prison life," states that the denial of access "constitut[es] cruel and unusual punishment," and cites a Supreme Court case in support of the proposition that "incarceration, standing alone, could constitute cruel and unusual punishment if it were 'disproportionate' in [relation] to the offense." [#4 at ¶¶ 12, 58 (citing *Solem*

obligation to review any "complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). "[A] court may dismiss a claim brought by a prisoner proceeding in forma pauperis at any time if it determines the claim is frivolous, fails to state a claim, or seeks monetary damages against a defendant who is immune from such relief." *Rivera v. Long*, No. 19-cv-03608-CMA-NYW, 2021 WL 326945, at *6 n.4 (D. Colo. Jan. 31, 2021), *report and recommendation adopted*, No. 19-cv-03608-CMA-NYW ECF No. 87, (citing 28 U.S.C. § 1915A(b)(1)). Upon review of the Amended Complaint, the court concludes that Mr. McDaniel has failed to state an Eighth Amendment claim based on either his sentence or the conditions of his confinement.

Disproportionate Sentence. The Eighth Amendment protects against the infliction of "cruel and unusual punishments," U.S. Const. amend. VIII, which the Supreme Court has determined to narrowly apply to sentences which are disproportionate to the offense. *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring); *see also Ewing v. California*, 538 U.S. 11, 20 (2003) ("The Eighth Amendment . . . contains a narrow proportionality principle that applies to noncapital sentences." (quotation omitted)). "Under [the] narrow proportionality principle, the Eighth Amendment does not require strict proportionality between crime and sentence," but "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *United States v. Angelos*, 433 F.3d 738, 750 (10th Cir. 2006) (quotation omitted). "[C]hallenges to [the sentencing] decision are not generally constitutionally cognizable, unless it is shown the

v. Helm, 463 U.S. 277 (1983)]. Moreover, with respect to his conditions-of-confinement claim, Plaintiff alleges that he is at a higher risk, relative to other inmates, of physical violence due to the nature of his offense, and that "CDOC employees are well aware" of this. [*Id.* at ¶¶ 59-60]. He states that, because access to the SOTMP would provide him additional safety, *see* [*id.* at ¶ 49], his "prolonged detention due to [his] deprivation of [SOTMP] treatment presents atypical risks relative to the ordinary incidents of prison life," which amounts to cruel and unusual punishment. [*Id.* at ¶ 60].

sentence imposed is outside the statutory limits or unauthorized by law." *Dennis v. Poppel*, 22 F.3d 1245, 1258 (10th Cir. 2000)).

The court finds that Plaintiff cannot sustain an Eighth Amendment claim based on the allegations arising from his sentence for two reasons. First, Plaintiff does not allege that his sentence is outside the statutory limits or unauthorized by law so as to state a valid Eighth Amendment claim. Plaintiff was sentenced pursuant to Colo. Rev. Stat. § 18-1.3-1004, which provided at the time of Plaintiff's sentencing that "the district court having jurisdiction shall sentence a sex offender to the custody of the department for an indeterminate term . . . [with] a maximum of the sex offender's natural life." Colo. Rev. Stat. § 18-1.3-1004(1)(a) (2002);[17] *see also Snyder v. Ortiz*, No. 06-cv-01488-WYD-BNB, 2008 WL 4538827, at *4 (D. Colo. Oct. 7, 2008) (discussing that sexual offenses committed after November 1, 1998 require indeterminate sentences up to life imprisonment). Plaintiff cannot claim that his continued incarceration, even if allegedly due to his lack of access to the SOTMP, is outside the statutory limits. *See Robinson v. Kansas Parole Bd.*, No. CIV. A. 95-3340-GTV, 1995 WL 519966, at *1 (D. Kan. Aug. 24, 1995) (finding that the plaintiff could not state an Eighth Amendment violation when his confinement was "well within the sentence imposed"). Moreover, because Plaintiff does not have a liberty interest in being released on parole, he cannot argue that he has been denied a constitutional right so as to render his sentence "unauthorized by law." *See Larocco v. NYS Div. of Parole*, No. 9:05-CV-1602, 2006 WL 1313341, at *3 (N.D.N.Y. May 12, 2006) (finding that the plaintiff had failed to state an Eighth Amendment claim because the "plaintiff [did] not have a liberty interest in being granted parole" and could not "show that he was deprived of a constitutional right" because he had "not yet completed his maximum term of incarceration"

[17] The current version of the law contains the same language.

(quotation omitted)); *cf. Patrick v. Raemisch*, 550 F. Supp. 2d 859, 865 (W.D. Wis. 2008) (a "lack of access to sex offender treatment or a fair parole hearing is not cruel and unusual punishment").

Moreover, it is not clear that even if Plaintiff could state a claim, a § 1983 action would be the proper vehicle to raise this claim. Plaintiff was sentenced to an indeterminate sentence of eight years to life, [#4 at ¶ 17], meaning that the fact that Plaintiff is still incarcerated, and potentially could be incarcerated for life, was contemplated by his original sentence. Accordingly, any claim asserting that Plaintiff's current incarcerated status renders his sentence unconstitutionally disproportionate to the crime concerns the validity of his sentence and appears barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), which held that a plaintiff cannot bring a § 1983 claim if a judgment in the plaintiff's favor would imply the invalidity of the plaintiff's conviction or sentence.[18] A claim which necessarily implicates the proportionality and validity of a sentence is properly raised in a habeas proceeding. *See Firth v. Shoemaker*, No. 09-cv-00224-MSK-MJW, 2010 WL 882505, at *4 (D. Colo. Mar. 8, 2010) ("The crux of these claims is that . . . Mr. Firth's permissible indeterminate sentence of six years to life became a determinate sentence of life without parole as the result of the unavailability of meaningful SOTMP programs . . . if Mr. Firth is correct that the maximum life sentence imposed upon him is invalid, the Court can grant relief on this issue only in the context of a *habeas* proceeding."). For each of these reasons, I find that Plaintiff cannot state an Eighth Amendment claim based on his continued incarceration.

Conditions of Confinement. Plaintiff also suggests that the conditions of his confinement give rise to an Eighth Amendment claim. The Eighth Amendment's proscription on cruel and

[18] Although the *Heck* holding concerned only claims for money damages, *see* 512 U.S. at 486-87, the Supreme Court later expanded *Heck*'s reach to include claims for injunctive relief, like Mr. McDaniel's, wherein the relief would implicate the validity of the claimant's sentence. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

unusual punishment extends to the conditions under which an inmate is confined. *See Contreras v. Dona Ana Cty. Bd. of Cty. Comm'rs*, 965 F.3d 1114, 1116 (10th Cir. 2020) (Tymkovich, J., concurring). The Eighth Amendment requires prison officials to "provide humane conditions of confinement." *Requena v. Roberts*, 893 F.3d 1195, 1214 (10th Cir. 2008). "Conditions-of-confinement claims have two prongs: (1) an objective prong, under which the alleged injury must be sufficiently serious, and (2) a subjective prong, under which the prison official who imposed the condition must have done so with deliberate indifference." *Redmond v. Crowther*, 882 F.3d 927, 936 n.3 (10th Cir. 2018). To satisfy the objective prong, a plaintiff must allege facts demonstrating that the conditions of confinement were objectively "sufficiently serious." *Id.* To satisfy the subjective component, a plaintiff must allege facts demonstrating that the defendant knew of, yet disregarded, an excessive risk to the plaintiff's health or safety. *See Walker v. Mohiuddin*, 947 F.3d 1244, 1249 (10th Cir. 2020) ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (internal quotation marks omitted)).

Although Plaintiff generally alleges that Defendants' actions demonstrate deliberate indifference with respect to his health and safety, *see* [#4 at ¶¶ 59-60], the court finds these allegations insufficient to satisfy either prong of an Eighth Amendment claim. With respect to the objective prong, Plaintiff asserts that "CDOC employees are well aware that [he is] at higher risk relative to other offenders of being targeted for violence or other adverse actions while incarcerated" but have "knowingly assigned [him] to a facility without SOTMP which put [him] in danger from other offenders." [*Id.* at ¶ 60]. However, Mr. McDaniel's non-specific allegation that "CDOC employees" disregarded a known risk is an insufficient allegation to establish that he is subject to a specific known risk, and that any of the named Defendants ignored that known risk.

See Rivera, 2021 WL 326945, at *13 ("[G]eneral allusions to 'S.C.F. authorities' that [the plaintiff] alleges 'are aware' of the risk posed to inmate informants at the prison do not plausibly suggest that those authorities and the Defendants in this action are one and the same.").

Even putting aside the lack of allegations specific to the named Defendants, Plaintiff's allegations are insufficient to satisfy the subjective prong of a conditions-of-confinement claim. Although Mr. McDaniel alleges that he is at a higher risk of physical violence due to not being housed at a facility that offers the SOTMP, [#4 at ¶¶ 49, 60], Mr. McDaniel does not explain why he would be at a lower risk of violence if he were housed at a facility that provides SOTMP treatment, or allege that, if he were housed at such a facility, he would not be housed in the general population or would otherwise be at a lower risk of violence. *See generally* [*id.*]. Instead, he simply states that he would receive "benefits related to physical security and safety that are . . . denied to sex offenders in general population" without explaining what those benefits are. [*Id.* at ¶ 49]. And Plaintiff's allegation that he was assaulted in an unnamed prison in 2005 cannot alone serve as the basis for Plaintiff's Eighth Amendment claim, as there are no factual averments that support a conclusion that the particular circumstances still exist today, and the statute of limitations period on a claim arising out of this sixteen-year assault has long passed.[19] Mr. McDaniel therefore fails to state an Eighth Amendment claim. For these reasons, the court **RECOMMENDS** that Defendant's Motion be **GRANTED** and that Claim Four be **DISMISSED without prejudice**, but that Plaintiff be granted leave to amend that claim insofar as his claim asserts a conditions-of-confinement claim. *Tinnin*, 2018 WL 6990396, at *4.[20]

[19] *See supra* n.11.

[20] Because Plaintiff cannot bring his disproportionate-sentence claim as a § 1983 action, the court finds that amendment with respect to that portion of the claim would be futile. Thus, leave to amend that portion is not warranted. *Jefferson County Sch. Dist. v. Moody's Investor's Servs.*, 175 F.3d 848, 859 (10th Cir.1999) ("Although Fed. R. Civ. P. 15(a) provides that leave to amend shall

For the reasons set forth herein, I respectfully **RECOMMEND** that Defendants' Motion be **GRANTED in part** and **DENIED in part** as set forth in this Recommendation, and that Plaintiff's First Amendment claim (Claim Three) and Eighth Amendment claim (Claim Four) be **DISMISSED without prejudice**, but that Plaintiff be **GRANTED** leave to amend the Amended Complaint to address the deficiencies raised in this Recommendation.

CONCLUSION

For the reasons stated herein, this court respectfully **RECOMMENDS** that:

(1) Defendants' Motion to Dismiss [#22] be **GRANTED IN PART** and **DENIED IN PART** as set forth in this Recommendation;

(2) Claim Three be **DISMISSED without prejudice**;

(3) Claim Four be **DISMISSED without prejudice**; and

(4) Plaintiff be **GRANTED** leave to amend the Amended Complaint as defined by this Recommendation.[21]

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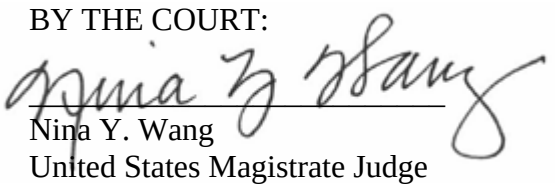
be given freely, the district court may deny leave to amend where amendment would be futile. A proposed amendment is futile if the complaint, as amended, would be subject to dismissal.").

[21] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the

DATED: May 10, 2021

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).